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June 08, 2007

GLORIA L. FRANKLIN, CLERK

U.S. BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: June 07, 2007

A handwritten signature in blue ink, appearing to read "T. Carlson".

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re) Case No. 05-32572 TEC 7
11 MARLA J. RABIN,) (administratively consolidated
fdbा Nosh Productions, Inc.,) with In re Nanoshka Johnson,
12) Case No. 05-32573)
13)
14) Chapter 7
15 Debtor.)
16)

MEMORANDUM RE TRUSTEE'S OBJECTION TO CLAIMS
OF PARAGON REAL ESTATE GROUP OF SAN FRANCISCO, INC.

The court held a hearing on April 16, 2007, on the trustee's objection to the two proofs of claim filed by Paragon Real Estate Group of San Francisco, Inc. (Paragon) against the Debtors in the above-captioned administratively consolidated bankruptcy estates. Reidun Strømsheim appeared for the trustee. Michael A. Gevertz appeared for Paragon.

Upon due consideration, and for the reasons stated below, I overrule the trustee's objection, and allow both of Paragon's claims as filed. Paragon shall not, however, be entitled to recover more than a total of \$38,500 on account of its two claims.

MEMORANDUM DECISION

1 **FACTS**

2 On May 9, 2005, Marla J. Rabin (Debtor) and Nanoshka Johnson,
3 equal co-owners of real property located at 158 Everson Street, San
4 Francisco (Property), signed a Residential Listing Agreement
5 (Agreement) with Paragon, granting it the exclusive right to sell
6 the Property. (Agreement, ¶ 1). The Agreement defines "Seller" as
7 Debtor and Nanoshka Johnson, and provides in relevant part as
8 follows regarding Pargaon's compensation: "Seller agrees to pay to
9 Broker as compensation for service irrespective of agency
10 relationship(s) . . . 5 percent of the . . . purchase price . . .
11 ." Agreement, ¶4A.

12 On May 20, 2005, Paragon listed the Property for sale. On
13 August 11, 2005, Ms. Rabin and Ms. Johnson each filed chapter 7
14 bankruptcy petitions. On August 29, 2005, this court signed an
15 order in each of the two bankruptcy cases granting the trustee's
16 motion to approve sale of the Property in the amount of \$770,000,
17 and requiring the trustee to pay from the sales proceeds the
18 mortgage and regular closing costs, except for Paragon's \$38,500
19 sales commission (Commission).

20 On September 7, 2005, the trustee filed an adversary
21 proceeding (No. 05-3401) against the title company holding the
22 proceeds from the sale of the Property, due to the title company's
23 alleged refusal to turn over the Commission to the trustee.

24 On September 21, 2005, the court signed an order granting the
25 trustee's motion to administratively consolidate the cases of
26 Debtor and Ms. Johnson, and requiring all future pleadings to be
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MEMORANDUM DECISION

1 filed in Debtor's bankruptcy case. The order did not substantively
2 consolidate the two cases.

3 On December 1, 2005, the parties to Adv. Proc. No. 05-3401
4 filed a stipulation (Stipulation) requiring the title company to
5 turn over to the trustee the Commission, and providing as follows
6 regarding the Commission: "Paragon Real Estate Group is entitled to
7 file a Proof of Claim in the bankruptcy case of In re Marla J.
8 Rabin and Nanoshka C. Johnson, and it has a valid general unsecured
9 claim in the amount of \$38,500 in that case."

10 On December 9, 2005, Paragon filed a general unsecured claim
11 in the amount of \$38,500 in each of the two bankruptcy cases.
12 Other than the case name and number, the claim filed in each case
13 is identical, and attaches a copy of the Agreement.

14 On April 6, 2006, the trustee filed and served on counsel for
15 Paragon an objection to Paragon's claim filed in the Nanoshka
16 Johnson case, seeking disallowance of such claim as a duplicate of
17 the claim filed in Debtor's bankruptcy case. Paragon did not file
18 a request for hearing on the trustee's objection.

19 Nearly one year later, on March 1, 2007, Trustee filed an
20 application seeking to reduce by 50% the claims filed by Paragon in
21 Ms. Johnson's and Debtor's bankruptcy cases, and allowing in each
22 case an unsecured claim in the sum of \$19,250. The application
23 provides as follows:

24 The Trustee has previously filed an objection to the
25 claim filed in the Johnson case, and asked that it be
26 disallowed. However, this was based on the erroneous
27 assertion that the two cases were substantively
consolidated. The cases have simply been
Administratively Consolidated, where the only asset of
the estate, the proceeds of the sale of a piece of real

28 **MEMORANDUM DECISION**

1 property, will be divided and paid one half each to the
2 creditors of each estate. . . .

3 On March 7, 2007, Paragon filed opposition to the trustee's
4 application, arguing that Ms. Johnson and Debtor are co-obligors
5 under the Agreement, and are jointly and severally liable
6 thereunder to pay Paragon the Commission. Paragon further argued
7 that the trustee's objection was inconsistent with the Stipulation,
8 and asked this court to allow its two claims in the amount of
9 \$38,500 each. On April 16, 2007, Paragon filed a supplemental
10 response to the trustee's claim objection, clarifying that it did
11 not seek to recover more than a total of \$38,500 from the two
12 bankruptcy estates.

13 On April 16, 2007, the court held a hearing on the trustee's
14 objection to Paragon's two proofs of claim. At the hearing,
15 counsel for the trustee stated that it appeared there were
16 insufficient funds to pay the claims of the two bankruptcy estates
17 in full, and argued that the Stipulation limited Paragon's claim to
18 one claim in the amount of \$38,500, that allowing the claim in each
19 case would be to allow Paragon a \$77,000 claim, and that such a
20 result would be unfair to other creditors.

21 Paragon argued that the obligation is joint and several in the
22 amount of \$38,500 against each Debtor under Cole v. Lowe, 81 Cal.
23 App. 633 (1927) and California Civil Code section 1659. Paragon
24 contended that the trustee should file in one of the bankruptcy
25 cases a contingent proof of claim for equitable contribution or
26 indemnity in the event she ended up paying Paragon more than a full
27 recovery.

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1 **LAW**

2 Property rights in the assets of a bankruptcy estate are
3 determined by state law. Butner v. U.S., 440 U.S. 48, 53 (1979).
4 In California, when "all parties who unite in a promise receive
5 some benefit from the consideration, whether past or present, their
6 promise is presumed to be joint and several." Cal. Civ. Code
7 § 1659. Furthermore, "[a] promise, made in the singular number,
8 but executed by several persons, is presumed to be joint and
9 several." Id. § 1660.

10 Both Debtor and Ms. Johnson signed the Agreement and
11 benefitted from Paragon's listing of the Property for sale and
12 procurement of a buyer for the Property. Based on the services
13 provided by Paragon, the trustee sold the Property for \$770,000.
14 Because both Debtor and Ms. Johnson united in the promise to pay
15 Paragon for its services, they are presumed to be jointly and
16 severally liable to Paragon for the commission, absent express or
17 implied language in the Agreement to the contrary. Cal. Code Civ.
18 Proc. §§ 1659, 1660 (statutory presumptions); Cole v. Lowe, 81 Cal.
19 App. at 638 (section 1659 presumption applies absent express or
20 implied language in agreement to the contrary).

21 There is no language in the Agreement that undermines the
22 statutory presumption of joint-and-several liability, and the
23 Trustee has not introduced any evidence other than the Stipulation
24 to rebut the presumption.

25 The Stipulation provides as follows regarding Paragon's claims
26 based on the Commission: "Paragon Real Estate Group is entitled to
27 file a Proof of Claim in **the** bankruptcy case of In re Marla J.
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1 Rabin and Nanoshka C. Johnson, and it has **a** valid general unsecured
2 claim in the amount of \$38,500 in that case." (emphasis added).
3 Eight days after the Stipulation was filed, Paragon filed a proof
4 of claim on account of the Commission in each of the two bankruptcy
5 cases. Four months after the Stipulation was filed, Trustee filed
6 an objection to one of the Paragon claims, based on what she later
7 admitted was a mistaken assumption that the two cases has been
8 substantively consolidated. The objection did not assert that the
9 filing of the two claims violated the Stipulation.

10 "A contract must be so interpreted as to give effect to the
11 mutual intention of the parties as it existed at the time of
12 contracting, so far as the same is ascertainable and lawful." Cal.
13 Civ. Code § 1636. Mutual intent is determined by the objective
14 manifestations of the parties' intent, including the words used in
15 the agreement, and the subsequent acts and conduct of the parties.
16 City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
17 68 Cal.App. 4th 445 (1998).

18 Paragon's prompt filing of two proofs of claim after execution
19 of the Stipulation objectively suggests that Paragon did not
20 believe the Stipulation altered its substantive legal rights. The
21 trustee's claim objection did not seek to disallow one of Paragon's
22 claims as contrary to the Stipulation, but rather as a duplicate
23 claim. This history suggests that the trustee also did not believe
24 that the Stipulation altered Paragon's substantive legal rights.

25 Because the Stipulation does not alter the substantive rights
26 of Paragon, and in light of the post-Stipulation conduct of the
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1 parties noted above, the court finds that the Stipulation does not
2 rebut the state-law presumption of joint and several liability.

3 Trustee cites to no Bankruptcy Code provision that alters
4 Paragon's state-law rights.

5 Although it does not appear likely that creditors of Debtor
6 and Ms. Johnson's bankruptcy estates will be paid more than a small
7 portion of their claims, it would be improper for Paragon to
8 receive more than a total of \$38,500 from both bankruptcy estates.
9 Accordingly, the court instructs the trustee not to pay Paragon
10 more than \$38,500 total on account of its claims against Debtor and
11 Ms. Johnson, as provided in the accompanying order.

12 ****END OF MEMORANDUM DECISION****

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